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OFFICE OF THE HIGH REPRESENTATIVE and
MIROSLAV LAJČÁK, in his capacity as High
Representative of the International Community in
Bosnia and Herzegovina

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY SARKIS,

Plaintiff,

v.

MIROSLAV LAJČÁK; OFFICE OF THE
HIGH REPRESENTATIVE,

Defendants.

Case No. C 08 01911 RMW

**SPECIALLY APPEARING DEFENDANTS'
NOTICE OF MOTION AND MOTION TO
DISMISS**

[Filed concurrently herewith Declaration of
Mark A. Cymrot and [Proposed] Order in
Support Thereof]

Date: October 31, 2008
Time: 9:00 a.m.
Judge: Hon. Ronald M. Whyte
Ctrm.: Courtroom 6

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 31, 2008, at 9:00 a.m. or as soon as the matter may be heard before the Honorable Ronald M. Whyte of the United States District Court, Northern District of California, San Jose Division, 280 South 1st Street, San Jose, California 95113-3099, in Courtroom 6, 4th Floor, Specially Appearing Defendants Office Of The High Representative and Miroslav Lajčák, in his capacity as High Representative of the International Community in Bosnia and Herzegovina, will and hereby do move the Court for an order dismissing Plaintiff's Complaint.

This motion is brought pursuant to Rules 12(b)(1), (2) and (5) of the Federal Rules of Civil Procedure on the following grounds:

(1) the Court lacks subject matter jurisdiction over Defendants under Rule 12(b)(1) because Defendants, as instrumentalities of a foreign state, are entitled to immunity from the Court's jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.* ("FSIA");

(2) the Court lacks personal jurisdiction over Defendants under Rule 12(b)(2); and

(3) Plaintiff Anthony Sarkis failed to properly effect service on Defendants in accordance with the FSIA.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, all pleadings and papers on file in this action, and upon such other documentary and oral evidence as may be presented to the Court at the time of the hearing on this Motion.

Dated: August 29, 2008

BAKER & HOSTETLER LLP
LISA I. CARTEEN

/s/ Lisa I. Carteen

Lisa I. Carteen
Attorneys for Specially Appearing Defendants
OFFICE OF THE HIGH REPRESENTATIVE
an MIROSLAV LAJČÁK, in his capacity as
High Representative of the International
Community in Bosnia and Herzegovina

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Specially Appearing Defendants the Office of the High Representative of Bosnia-Herzegovina (“OHR”) and Ambassador Miroslav Lajčák¹ (collectively “Defendants”) move for the Court to dismiss this suit because Plaintiff Anthony Sarkis improperly served them and the Court lacks personal and subject matter jurisdiction over them. Although aware of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (“FSIA”), Mr. Sarkis chose not to follow its requirements for service of process or to plead the necessary elements of a waiver of sovereign immunity. The Court, in fact, lacks jurisdiction over OHR and Ambassador Lajčák because they are immune from the jurisdiction of United States courts.

Mr. Sarkis’ Complaint is based on Defendants’ alleged early termination of his employment contract with OHR in Bosnia-Herzegovina (“Bosnia”) in 2007. OHR, however, is an instrumentality of foreign states entitled to immunity from the jurisdiction of this Court.

OHR was established by the Dayton Peace Accords, a peace agreement brokered by the United States and its European allies in 1995, which ended the war in Bosnia. OHR monitors the implementation of, and ensures full compliance with, the civilian aspects of the peace agreement on behalf of the international community. OHR is endorsed by several United Nations Security Council resolutions.² OHR is an instrumentality of the Peace Implementation Council (“PIC”), a group of fifty-five foreign states and international organizations formed to support and oversee the peace implementation process and the work of OHR.

As an instrumentality of foreign states, OHR is entitled to immunity unless one of the exceptions to immunity under the FSIA applies. Mr. Sarkis has not identified an exception (which is his burden), and is unable to do so because none apply to foreign government officials like Defendants who are performing governmental duties in a foreign state.

¹ Ambassador Lajčák is “double-hatted” serving also as the European Union Special Representative in Bosnia and Herzegovina. *See*, Council Joint Action 2007/87/CFSP adopted under Title V of the Treaty of the European Union. He is a career diplomat in the Slovak Ministry of Foreign Affairs. Declaration of Mark A. Cymrot (“Cymrot Decl.”) ¶ 2 and Exhibit A attached thereto.

² The North Atlantic Treaty Organization had primary responsibility for military aspects of the peace agreement.

1 In addition, all of the FSIA exceptions require some nexus to the United States that
2 approximates the due process minimum contacts requirements. OHR's headquarters is in
3 Sarajevo, Bosnia and OHR maintains a small office in Brussels, Belgium for contacts with
4 European Union institutions and the North Atlantic Treaty Organization. OHR is only involved
5 in governmental functions; it acts only in Bosnia; and it has no presence in California or the
6 United States.

7 Mr. Sarkis was General Counsel of OHR – performing his duties in Bosnia – until he was
8 dismissed in April 2007. He alleges breach of his employment agreement, wrongful termination
9 and libel among other claims. None of his claims arise out of his recruitment in California in
10 2003; rather, they all involve acts allegedly committed four years later in Bosnia surrounding
11 Mr. Sarkis' termination from OHR.

12 As for Ambassador Lajčák's role in this lawsuit, he was not even the High Representative
13 until after Mr. Sarkis was terminated; he committed none of the acts alleged in the Complaint in
14 California or otherwise.

15 As instrumentalities of foreign states, OHR and Ambassador Lajčák are entitled to
16 immunity from the jurisdiction of this Court under the FSIA, and, therefore, this lawsuit should
17 be dismissed.

18 **II. STATEMENT OF FACTS**

19 **A. Allegations Of The Complaint**

20 Mr. Sarkis, a California resident, was employed in Bosnia by OHR first as Legal Counsel
21 and then as General Counsel. Compl. ¶¶ 2, 55. He alleges that in January 2003 he noted OHR's
22 advertisement for the vacant Legal Counsel position in the *Economist*, a weekly newsmagazine
23 with worldwide circulation. Compl. ¶ 12. He then alleges a series of contacts he had in
24 California through email or telephone that led to his employment in Sarajevo, Bosnia. Compl.
25 ¶¶ 14-25. Mr. Sarkis signed his initial contract in California and faxed it to OHR in Bosnia.
26 Compl. ¶¶ 26, 27. After negotiating additional details, Mr. Sarkis coordinated his travel plans
27 with OHR, which purchased the ticket for his flight to Bosnia where Mr. Sarkis began his
28 employment with OHR. Compl. ¶¶ 28-36.

Under what Mr. Sarkis characterizes as an “umbrella employment agreement,” OHR allegedly agreed to employ Mr. Sarkis for the duration of OHR’s mandate, unless he was terminated for cause. Compl. ¶ 2. Mr. Sarkis is apparently attempting to incorporate his negotiations into the terms of his annual written contracts. He alleges that the “umbrella agreement” was an express written contract as evidenced by an e-mail exchange (Count III); an express oral contract (Count IV); and an implied-in-fact contract (Count V). According to Mr. Sarkis, the “umbrella agreement” stipulated that it would be subsumed by a series of consecutive annual contracts, the expiration of which would “absent cause, trigger OHR’s declared and assumed legal obligations to renew and extend the same for each succeeding calendar year in the remaining balance” of Mr. Sarkis’ employment, which was to end with OHR’s mandate. Compl. ¶ 3. These annual contracts, however, are the only written employment contracts pertaining to this action.³

The annual contracts allegedly required cause for termination. Compl. ¶ 3. Each annual employment contract, however, contained an early termination clause allowing either party to terminate the agreement with two months notice. Compl. Exhibit D, p. 3, ¶ 5. After the first annual contract, Mr. Sarkis executed his contracts in Bosnia where he resided and performed his duties for OHR.

Mr. Sarkis was employed in Sarajevo, Bosnia until April 13, 2007, when OHR allegedly dismissed him before the end of OHR’s mandate and the end-date of the 2007 annual contract without warning, a stated cause, or a disciplinary hearing, as required by the annual contract, among other things. Compl. ¶¶ 3, 53. These actions allegedly breached the “umbrella agreement” and the last of the annual contracts in 2007. Mr. Sarkis was expelled from OHR’s premises, “without justification,” on the day he was terminated, although the termination did not

³ The final annual contract attached to the Complaint as Exhibit D demonstrates that Mr. Sarkis did not have guaranteed employment for the duration of OHR’s mandate unless he was terminated for cause. The contract states: “[E]ither either party may terminate the appointment at any time with two months notice signed by the party and in writing.” Compl., Ex. D, p. 3, ¶ 5. Mr. Sarkis, an attorney, would certainly understand that this specific provision would override any oral or email statements made to him four years earlier during negotiations for his earlier position as Legal Counsel.

1 take effect until two months later. He claims that his termination and expulsion from OHR's
 2 premises "were discriminatory and in retaliation for frank advice rendered by" him. Compl. ¶ 53.

3 He further alleges that on the day of his termination an OHR representative published a
 4 defamatory e-mail that was seen and read by OHR within its premises in Bosnia or wherever
 5 OHR members had access to their OHR e-mail accounts, and "may have been forwarded to third
 6 parties beyond OHR who also may have seen and read the same." Compl. ¶ 158.

7 Mr. Sarkis has brought twenty claims against Defendants. They are as follows:

- 8 ▪ Breach of Contract (Count One, Compl. ¶¶ 61-70, Count Two, Compl. ¶¶ 71-80,
 9 Count Three, Compl. ¶¶ 81-91; Count Four, Compl. ¶¶ 92-102; Count Five,
 10 Compl. ¶¶ 103-111);
- 11 ▪ Promissory Estoppel (Count Six, Compl. ¶¶ 112-121);
- 12 ▪ Equitable Estoppel (Count Seven, Compl. ¶¶ 122-130);
- 13 ▪ Wrongful Termination in Violation of Public Policy (Count Eight, Compl. ¶¶ 131-
 14 145);
- 15 ▪ Retaliatory Termination in Violation of Public Policy (Count Nine, Compl.
 16 ¶¶ 146-155);
- 17 ▪ Libel by Innuendo (Count Ten, Compl. ¶¶ 156-175);
- 18 ▪ Defamation by Conduct (Count Eleven, Compl. ¶¶ 176-189);
- 19 ▪ Violation of California Labor Code Section 970 (Count Twelve, Compl. ¶¶ 190-
 20 193);
- 21 ▪ Violation of California Labor Code Section 2924 (Count Thirteen, Compl. ¶¶ 194-
 22 196);
- 23 ▪ Promissory Fraud (Count Fourteen, Compl. ¶¶ 197-243);
- 24 ▪ Misrepresentation (Count Fifteen, Compl. ¶¶ 244-288, Count Sixteen, Compl.
 25 ¶¶ 289-292);
- 26 ▪ Suppression of Material Fact (Count Seventeen, Compl. ¶¶ 293-318, Count
 27 Eighteen, Compl. ¶¶ 319-322); and
- 28 ▪ Infliction of Emotional Distress (Count Nineteen, Compl. ¶¶ 323-333, Count
 Twenty, Compl. ¶¶ 334-337).

26 Mr. Sarkis has allegedly brought these claims against Ambassador Lajcák in his official
 27 capacity as High Representative. Compl. ¶ 10. Ambassador Lajcák has served as the High
 28

Representative from July 2007 to present, and, therefore, was not the High Representative at the time of the actions giving rise to Mr. Sarkis' claims, as Mr. Sarkis himself admits. Compl. ¶ 10.⁴

B. OHR Background

The United States played a leading role in negotiating the 1995 Dayton Peace Accords, formally referred to as the General Framework Agreement for Peace ("GFAP"), which ended the deadliest conflict in Europe since the Second World War. The parties to the GFAP are each foreign states: Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic of Yugoslavia⁵ (collectively "GFAP Parties"). The Peace Implementation Council ("PIC") is made up of 55 foreign states and international organizations that support the peace process in Bosnia.⁶ The United States is one of the founding members of the PIC and has been a strong supporter of the GFAP and its implementation. The PIC provides financial and other material assistance to OHR, meets to review progress in the peace implementation process, and appoints the High Representative.⁷ The PIC also has a Steering Board, which serves as the executive of the PIC under the chairmanship of the High Representative, to whom it provides political guidance.⁸ The United States is a member of the Steering Board, along with the governments of Canada, France, Germany, Italy, Japan, Russia, United Kingdom, Presidency of the European Union, European Commission and the Organization of the Islamic Conference, which is represented by Turkey.⁹

⁴ OHR, "All HR's and Deputy HR's," <http://www.ohr.int/ohr-info/hrs-dhrs/>. Cymrot Decl. ¶ 3 and Exhibit B attached thereto.

⁵ Now the Republic of Serbia.

⁶ OHR, The Peace Implementation Council and its Steering Board, available at <http://www.ohr.int/ohr-info/gen-info/#6>. Cymrot Decl. ¶ 4 and Exhibit C attached thereto.

⁷ There have been six High Representatives since the end of the war, all from European countries.

⁸ OHR, The Peace Implementation Council and its Steering Board, available at <http://www.ohr.int/ohr-info/gen-info/#6> (stating: "In Sarajevo, the High Representative chairs weekly meetings of the Ambassadors to [Bosnia] of the Steering Board members. In addition, the Steering Board meets at the level of political directors every three months."). Cymrot Decl. ¶ 4 and Exhibit C attached thereto.

⁹ *Id.*

1 **C. OHR's Powers**

2 OHR was created under the GFAP to oversee “the implementation of the civilian aspects
3 of the Peace Agreement on behalf of the international community.”¹⁰ OHR is the “chief civilian
4 peace implementation agency in Bosnia and Herzegovina.”¹¹ OHR is a separate legal person
5 from the GFAP parties.¹² OHR consists of “diplomats seconded by the governments of the
6 [Peace Implementation Council] countries,” international experts, and national staff from
7 Bosnia.¹³

8 The High Representative is “the final authority in theater regarding interpretation of [the
9 GFAP, Annex 10] on the civilian implementation of the peace settlement.”¹⁴ Under Annex 10 of
10 the GFAP, OHR “has the status of a diplomatic mission to Bosnia and Herzegovina.”¹⁵ The
11 GFAP Parties have agreed to:

12 “accord the High Representative and professional members of his or her
13 staff and their families the same privileges and immunities as are enjoyed
14 by diplomatic agents and their families under the Vienna Convention on
Diplomatic Relations.”¹⁶

15 Other members of OHR staff are to be accorded the same privileges and immunities afforded to
16 administrative and technical staff under the Vienna Convention.¹⁷

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18 ¹⁰ OHR, Basic Information, General Information, available at <http://www.ohr.int/ohr-info/gen-info/#1>.
Cymrot Decl. ¶ 4 and Exhibit C attached thereto.

19 ¹¹ *Id.*

20 ¹² *See* General Framework Agreement for Peace, Annex 10, Art. III, para. 3, Bosn. & Herz., Croat., Yugo.,
Dec. 14, 1995, 35 I.L.M. 75 [hereinafter GFAP], available at
21 http://www.ohr.int/GFAP/default.asp?content_id=366. (“The High Representative shall enjoy, under the
22 laws of Bosnia and Herzegovina, such legal capacity as may be necessary for the exercise of his or her
functions, including the capacity to contract and to acquire and dispose of real and personal property.”).
Cymrot Decl. ¶ 5 and Exhibit D attached thereto.

23 ¹³ OHR, Basic Information, Status, Staff and Funding of the OHR, available at <http://www.ohr.int/ohr-info/gen-info/#5>. Cymrot Decl. ¶ 4 and Exhibit C attached thereto.

24 ¹⁴ GFAP, Annex 10, Art. V: Final Authority to Interpret. Cymrot Decl. ¶ 5 and Exhibit D attached
thereto.

25 ¹⁵ OHR, Basic Information, Status, Staff and Funding of the OHR, available at <http://www.ohr.int/ohr-info/gen-info/#5>. Cymrot Decl. ¶ 4 and Exhibit C attached thereto.

26 ¹⁶ Annex 10, Agreement on Civilian Implementation, Article III (4)(b), available at
27 http://www.ohr.int/GFAP/default.asp?content_id=366. Cymrot Decl. ¶ 5 and Exhibit D attached thereto.

28 ¹⁷ *Id.* at Article III (4)(c). Cymrot Decl. ¶ 5 and Exhibit D attached thereto.

The United Nations Security Council has endorsed the High Representative and its work numerous times. In December 1995, the Security Council adopted Resolution 1031, which welcomed the signing of the GFAP and “[e]ndorse[d] the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved....”¹⁸ The Security Council also has “emphasize[d] its full support for the continued role of the High Representative in monitoring the implementation of the Peace Agreement and giving guidance to and coordinating the activities of the civilian organizations and agencies involved in assisting the parties to implement the Peace Agreement.”¹⁹ Since 1995, the Security Council has repeatedly adopted resolutions containing similar language.²⁰ As recently as June 29, 2007, the Security Council reaffirmed the High Representative’s final authority to interpret Annex 10.²¹

¹⁸ S.C. Res. 1031, ¶ 26, U.N. Doc. S/RES/1031 (Dec. 15, 1995). Cymrot Decl. ¶ 6 and Exhibit E attached thereto.

¹⁹ See S.C. Res. 1174, ¶ 4, U.N. Doc. S/RES/1174 (June 15, 1998); S.C. Res. 1247, ¶ 4, U.N. Doc. S/RES/1247 (June 18, 1999); S.C. Res. 1305, ¶ 4, U.N. Doc. S/RES/1305 (June 21, 2000); S.C. Res. 1357, ¶ 4, U.N. Doc. S/RES/1357 (June 21, 2001); S.C. Res. 1423, ¶ 4, U.N. Doc. S/RES/1423 (July 12, 2002); S.C. Res. 1491, ¶ 4, U.N. Doc. S/RES/1491 (July 11, 2003); S.C. Res. 1551, ¶ 4, U.N. Doc. S/RES/1551 (July 9, 2004); S.C. Res. 1575, ¶ 4, U.N. Doc. S/RES/1575 (Nov. 22, 2004); S.C. Res. 1639, ¶ 4, U.N. Doc. S/RES/1639 (Nov. 21, 2005); and S.C. Res. 1722, ¶ 4, U.N. Doc. S/RES/1722 (November 21, 2006). See also S.C. Res. 1112, ¶ 3, U.N. Doc. S/RES/1112 (June 12, 1997) and S.C. Res. 1764, ¶¶ 3-4, U.N. Doc. S/RES/1764 (June 29, 2007) (reaffirming the importance the Security Council attaches to the High Representative’s role). Cymrot Decl. ¶¶ 7-18 and Exhibits F through Q attached thereto.

²⁰ See S.C. Res. 1031, ¶¶ 26-27, U.N. Doc. S/RES/1031 (Dec. 15, 1995); S.C. Res. 1088, ¶ 14, U.N. Doc. S/RES/1088 (Dec. 12, 1996); S.C. Res. 1112, ¶ 3, U.N. Doc. S/RES/1112 (June 12, 1997); S.C. Res. 1174, ¶ 4, U.N. Doc. S/RES/1174 (June 15, 1998); S.C. Res. 1247, ¶ 4, U.N. Doc. S/RES/1247 (June 18, 1999); S.C. Res. 1305, ¶ 4, U.N. Doc. S/RES/1305 (June 21, 2000); S.C. Res. 1357, ¶ 4, U.N. Doc. S/RES/1357 (June 21, 2001); S.C. Res. 1423, ¶ 4, U.N. Doc. S/RES/1423 (July 12, 2002); S.C. Res. 1491, ¶ 4, U.N. Doc. S/RES/1491 (July 11, 2003); S.C. Res. 1551, ¶ 4, U.N. Doc. S/RES/1551 (July 9, 2004); S.C. Res. 1575, ¶ 4, U.N. Doc. S/RES/1575 (Nov. 22, 2004); S.C. Res. 1639, ¶ 4, U.N. Doc. S/RES/1639 (Nov. 21, 2005); S.C. Res. 1722, ¶ 4, U.N. Doc. S/RES/1722 (November 21, 2006); S.C. Res. 1764, ¶¶ 3-4, U.N. Doc. S/RES/1764 (June 29, 2007). Cymrot Decl. ¶¶ 6-19, and Exhibits E through R attached thereto.

²¹ S.C. Res. 1764, ¶ 4, U.N. Doc. S/RES/1764 (June 29, 2007). Cymrot Decl. ¶ 18 and Exhibit Q attached thereto.

1 The PIC, of which the United States is a founding member, has also endorsed the High
 2 Representative's powers. At its conference in Bonn in December 1997, the PIC endorsed the
 3 High Representative's:

4 "use [of] his final authority in theatre regarding interpretation of the
 5 Agreement on the Civilian Implementation of the Peace Settlement
 6 in order to facilitate the resolution of difficulties by *making binding*
 7 *decisions, as he judges necessary, on ... measures to ensure*
 8 *implementation of the [GFAP] throughout Bosnia and Herzegovina*
 9 *and its Entities, as well as the smooth running of the common*
 10 *institutions. Such measures may include actions against persons*
 11 *holding public office or officials ... who are found by the High*
 12 *Representative to be in violation of legal commitments made under*
 13 *the [GFAP] or the terms for its implementation."*²²

14 These powers are often referred to as the High Representative's Bonn Powers and have been
 15 endorsed by subsequent PIC Declarations and UN Security Council Resolutions.

16 Some of the Bonn Powers are similar to powers exercised by a sovereign. Within Bosnia,
 17 the High Representative can impose laws and appoint and remove government officials. Previous
 18 High Representatives have used their authority to remove elected officials from office, including
 19 presidents, when those officials have deliberately engaged in activities that undermine the peace
 20 process. Much of the legislation that created functioning, democratic state institutions was either
 21 drafted by staff of the OHR and imposed by the High Representative or was adopted by domestic
 22 authorities at the urging of the High Representative and with support from his office.

23 The United States has directly endorsed the GFAP and OHR and explicitly declared its
 24 work as important to U.S. national security and foreign policy. From 1995 to 2005, the United
 25 States provided more than \$1.354 billion in bilateral assistance to support implementing the
 26 GFAP.²³ In Executive Order 13219, which was issued on June 27, 2001, President Bush
 27 determined that "the actions of persons engaged in, or assisting, sponsoring or supporting ... acts
 28 obstructing the implementation of the Dayton Accords" threaten the United States' national

²² PIC Bonn Conclusions, Dec. 10, 1997, XI.2, available at
http://www.ohr.int/pic/default.asp?content_id=5182#11. Cymrot Decl. ¶ 20 and Exhibit S attached
 thereto.

²³ U.S. Assistance to Bosnia and Herzegovina - Fiscal Years 1995-2005, Bureau of European and
 Eurasian Affairs, available at <http://www.state.gov/p/eur/rls/fs/57223.htm>. Cymrot Decl. ¶ 21 and Exhibit
 T attached thereto.

1 security and foreign policy.²⁴ He declared a national emergency to deal with the threat and
 2 ordered all property already in the United States or coming into the United States belonging to
 3 people who have obstructed or pose a risk of obstructing the implementation of the GFAP be
 4 blocked.²⁵ On June 24, 2008, President Bush continued for one year the national emergency he
 5 declared in Executive Order 13219.²⁶

6 The European Union (“EU”) has a European Union Special Representative (“EUSR”) in
 7 Bosnia, a role currently held by Ambassador Lajčák. The Council of the EU has stated that its
 8 policy objectives in Bosnia “centre around continued progress in the implementation of the
 9 General Framework Agreement for Peace (GFAP) in [Bosnia and Herzegovina], in accordance
 10 with the Office of the High Representative’s Mission Implementation Plan, and in the
 11 Stabilisation and Association Process, with the aim of a stable, viable, peaceful and multienthnic
 12 [Bosnia and Herzegovina], cooperating peacefully with its neighbours an irreversibly on track
 13 toward EU membership.”²⁷

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 17 ²⁴ The Department of the Treasury, From the Office of Public Affairs, Operation Balkan Vice III:
 18 Treasury Designation of Thirteen Individuals Obstructing the Dayton Peace Accords in Bosnia (Feb. 9,
 19 2004). Cymrot Decl. ¶ 22 and Exhibit U attached thereto. On May 29, 2003, President Bush issued
 20 Executive Order 13304, which modified Executive Order 13219. Cymrot Decl. ¶ 23 and Exhibit V
 21 attached thereto. The revised Executive Order expanded the types of individuals whose property should
 22 be blocked to include those who obstructed or posed a risk of obstructing the GFAP or “Conclusions of the
 23 Peace Implementation Conference held in London on December 8-9, 1995, including the decisions or
 24 conclusions of the High Representative, the Peace Implementation Council or its Steering Board, relating
 25 to Bosnia and Herzegovina.” The U.S. Treasury Department’s Office of Foreign Assets Control has
 26 designated individuals under the Executive Orders so those individuals’ assets in the United States could
 27 be blocked.

28 ²⁵ *Id.* The 13 individuals were designated, in part, for obstructing, posing a risk of obstructing, or
 supporting the obstruction of the GFAP, including the decisions of the High Representative, or supporting
 individuals who were designated under the order. Former High Representative Ashdown announced that
 ten of the individuals’ assets were blocked in Bosnia in a parallel action.

²⁶ Presidential Documents, Continuation of the National Emergency with Respect to the Western Balkans,
 73 Fed. Reg. 123 (June 25, 2008). Cymrot Decl. ¶ 24 and Exhibit W attached thereto.

²⁷ *See*, Council Joint Action 2008/130/CFSP, p. L 35/35, Article II. Cymrot Decl. ¶ 25 and Exhibit X
 attached thereto. Article V also states “The role of the EUSR shall not in any way prejudice the mandate
 of the High Representative in [Bosnia and Herzegovina], including his coordinating role with regard to all
 activities of all civilian organization and agencies as set out in the GFAP and subsequent Peace
 Implementation Council (PIC) conclusions and declarations.” *Id.* at p. L 35/36.

D. Mr. Sarkis' Diplomatic Role At OHR

Mr. Sarkis claims that he accepted OHR's offer of employment for the position of Legal Counsel on March 3, 2003. Compl. ¶¶ 12, 26. He was elevated to the position of General Counsel on June 1, 2005. Compl. ¶ 55. Mr. Sarkis alleges that "beginning in late 2003 and extending to 2007, OHR tasked [Mr. Sarkis] to initiate and spearhead direct negotiations with several foreign governments on highly sensitive issues." Compl. ¶ 58. He also alleges that OHR asked him "to serve as one of only two senior international staff members in the residual 22-person OHR Liquidation Team." Compl. ¶ 59. A letter from Lord Ashdown, then High Representative, also indicates that Mr. Sarkis' work entailed contributing to "OHR's internal governance rationalization, legal sustainability and transition capacity-building." Compl., Ex. B. In addition, "within weeks of his arrival, he initiated a process which culminated in OHR's legal interests being considerably advanced" and he helped Lord Ashdown ensure that "important legal aspects" of Lord Ashdown's personal mandate were "put in order and made consistent with best practice." Compl., Ex. B. He also assisted Lord Ashdown in resolving "sensitive political, public relations and security issues." Compl., Ex. B. Dr. Schwarz-Schilling, the subsequent High Representative, also has stated that Mr. Sarkis helped him "consolidate critical personal legal aspects" of his and Lord Ashdown's mandates. Compl., Ex. C.

As a professional member of the High Representative's staff, Mr. Sarkis was granted by the GFAP parties the same privileges and immunities enjoyed by diplomatic agents and their families under the Vienna Convention.

III. ARGUMENT

The Court must dismiss this action under Rules 12(b)(1), (2) and (5) of the Federal Rules of Civil Procedure. OHR is an instrumentality of foreign states, and, therefore, the FSIA is the sole basis of this Court's jurisdiction. The Complaint, thus, should be dismissed because Mr. Sarkis did not properly serve Defendants under the FSIA. In addition, as an instrumentality of foreign states, OHR is entitled to immunity, and the Court does not have subject matter or personal jurisdiction to hear this dispute.

1 **A. OHR Is An Instrumentality Of Foreign States Entitled To Immunity**

2 The FSIA provides foreign states and their instrumentalities with immunity from the
3 jurisdiction of courts in the United States, unless one of the specified exceptions to immunity
4 applies. *See* 28 U.S.C. § 1604. Under the FSIA, a foreign state is defined to include agencies and
5 instrumentalities. *See* 28 U.S.C. § 1603(a). An agency or instrumentality of a foreign state is an
6 entity:

7 (1) which is a separate legal person, corporate or otherwise, and

8 (2) which is an *organ of a foreign state* or political subdivision
9 thereof, or a majority of whose shares or other ownership interest is
owned by a foreign state or political subdivision thereof, and

10 (3) which is neither a citizen of a State of the United States as
11 defined in section 1332 (c) and (d) of this title, nor created under
the laws of any third country.

12 28 U.S.C. § 1603(b) (emphasis added).

13 OHR satisfies the three-prong test as an agency or instrumentality of the PIC and as such
14 is entitled to immunity under the FSIA: (1) The GFAP, Annex 10, Art. III, p. 2, ¶ 3, grants OHR
15 legal capacity within Bosnia and Herzegovina.²⁸ *See* Cymrot Decl. ¶ 5 and Exhibit D attached
16 thereto; (2) OHR is an “organ” of the foreign states that make up the PIC. *See, e.g., EIE Guam*
17 *Corp. v. The Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 641 (9th Cir. 2003) (a
18 corporation formed “to carry out Japanese national policy” was an “organ” of the Japanese
19 government); and (3) OHR is not “created under the laws of any third country;” it was created
20 pursuant to international agreement among (and/or sponsored by) multiple sovereign nations. *See*
21 *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1406 (E.D. Va. 1988) (corporation established by
22 treaty is not created under the laws of any third country); *see also Mangattu v. M/V Ibn Hayyan*,
23 35 F.3d 205, 209 (5th Cir. 1994) (same, *citing LeDonne*); *In re Air Crash Disaster Near*
24 *Roselawn*, 96 F.3d 932, 938-939 (7th Cir. 1996) (joint venture between Italy and France was not
25 created under the laws of a third country).

26 ²⁸ *See also*, S.C. Res. 1031, ¶ 28, U.N. Doc. S/RES/1031 (Dec. 15, 1995), in which the U.N. Security
27 Council “*Decides* that all States concerned, and in particular those where the High Representative
28 establishes offices, shall ensure that the High Representative enjoys such legal capacity as may be
necessary for the exercise of his functions, including the capacity to contract and to acquire and dispose of
real and personal property....” Cymrot Decl. ¶ 6 and Exhibit E attached thereto.

B. The Complaint And Summons Were Not Properly Served

Mr. Sarkis served the Summons and Complaint by having a process server send them by certified mail to OHR. *See* Mr. Sarkis' Affidavits of Mailing, Docket Entries 11 and 12. This method of service does not satisfy any of the requirements of 28 U.S.C. § 1608(b), which governs service under the FSIA. That statute states:

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

28 U.S.C. § 1608(b).

The statute establishes a hierarchy of methods for serving the summons and complaint. Mr. Sarkis and the Defendants did not have any special arrangement regarding service of the summons and complaint, and therefore service under Section 1608(b)(1) does not apply. There exists no OHR agent in the United States to be served and there is no applicable international convention on service of judicial documents, so Section 1608(b)(2) does not apply either. Mr. Sarkis did not choose to make service under Section 1608(b)(3)(B), which requires the clerk of the court to mail a copy of the summons and complaint, along with a translation of each into

1 the official language of the foreign state, to the instrumentality by a method that requires a signed
2 receipt.

3 According to the Affidavit of Mailing by Process Server that Mr. Sarkis has filed, the
4 process server mailed the complaint and summons via DHL to OHR. Thus, Mr. Sarkis did not
5 comply with the statute, which requires the clerk of the court to mail the summons and complaint
6 to the instrumentality. Therefore, Mr. Sarkis did not properly serve Defendants and the Court
7 should dismiss the Complaint.

8 **C. The Court Lacks Subject Matter Jurisdiction Because Defendants Have**
9 **Immunity Under The Foreign Sovereign Immunities Act**

10 Defendants also move to dismiss the Complaint for lack of subject matter jurisdiction
11 under Rule 12(b)(1). The Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a), states:

12 The district courts shall have original jurisdiction without regard to
13 amount in controversy of any nonjury civil action against a foreign
14 state as defined in section 1603(a) of this title [28 USCS § 1603(a)]
15 as to any claim for relief in personam with respect to which the
16 foreign state is not entitled to immunity either under sections 1605-
17 1607 of this title [28 USCS §§ 1605-1607] or under any applicable
18 international agreement.

16 The FSIA provides the sole source for federal jurisdiction over an action involving an
17 instrumentality of a foreign state. *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 323 (9th Cir.
18 1996) (citing *Export Group v. Reef Indus.*, 54 F.3d 1466, 1469 (9th Cir. 1995)). Section 1604
19 provides that:

20 “[A] foreign state shall be immune from the jurisdiction of the
21 courts of the United States and of the States except as provided in
22 sections 1605-1607 of this chapter.”

22 28 U.S.C. § 1604. The FSIA creates a presumption that a foreign sovereign is immune from suit
23 unless one of the exceptions to immunity contained in the statute applies. *Budget Rent-A-Car*, 97
24 F.3d at 323.

25 Under this statute, once Defendants make a *prima facie* showing that they are an
26 instrumentality of a foreign state, they are entitled to a presumption of immunity. *Phaneuf v.*
27 *Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997). “[W]hen considering a motion to
28 dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings,

1 but may review any evidence, such as affidavits and testimony, to resolve factual disputes
 2 concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.
 3 1988). The declaration of Mark A. Cymrot is submitted herewith, which supports Defendants’
 4 *prima facie* showing. Then, “the burden of production shifts to the plaintiff to offer evidence that
 5 an exception [to immunity] applies.” *Phaneuf*, 106 F.3d at 307.

6 Since OHR is an instrumentality of foreign states, in particular the PIC countries, it is
 7 entitled to immunity from the Court’s jurisdiction under the FSIA, unless one of the exceptions
 8 specified in the statute applies. 28 U.S.C. §§ 1605-1607. Mr. Sarkis, who was well aware of
 9 these requirements, has not alleged that any of the FSIA exceptions apply. Since Mr. Sarkis
 10 cannot meet his burden of showing an exception to immunity applies to his allegations, the
 11 lawsuit must be dismissed for lack of subject matter jurisdiction.

12 **D. Ambassador Lajcák Is Immune From Suit Under The FSIA**

13 It is not clear why Ambassador Lajcák is a defendant; he is not alleged to have committed
 14 any acts regarding Mr. Sarkis, in California, the United States or otherwise. The FSIA applies to
 15 an individual acting in his or her official capacity as an employee of a foreign state. *Chuidian v.*
 16 *Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (official of Philippine government
 17 granted immunity as an instrumentality of the republic for acts he committed while acting in his
 18 official capacity). Since OHR is entitled to immunity under the FSIA, Ambassador Lajcák also
 19 must be granted immunity under the FSIA for an action against him as the High Representative.

20 **E. The Court Lacks Personal Jurisdiction Over Defendants**

21 Defendants also move to dismiss the complaint for lack of personal jurisdiction under
 22 Rule 12(b)(2). “Once the defendant has challenged the exercise of personal jurisdiction, the
 23 plaintiff bears the burden of showing that the court has jurisdiction.” *Butcher’s Union Local No.*
 24 *498, United Food and Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986)
 25 (citations omitted). The requirements for personal jurisdiction under the FSIA are set forth in 28
 26 U.S.C. § 1330(b), which states:
 27
 28

1 “Personal jurisdiction over a foreign state shall exist as to every
2 claim for relief over which the districts courts have jurisdiction
3 under subsection (a) where service has been made under section
4 1608 of this title.”

5 Mr. Sarkis has not perfected service properly under Section 1608. *See* Mr. Sarkis’ Affidavits of
6 Mailing, Docket Entries 11 and 12. In addition, personal jurisdiction over a foreign state exists
7 only when one of the exceptions to foreign sovereign immunity applies. *Argentine Republic v.*
8 *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989). As explained above, Mr. Sarkis
9 has not met his burden to identify an applicable FSIA exception, and thus the Court does not have
10 personal jurisdiction over the Defendants.

11 Each of the exceptions have a nexus requirement to the United States that approximates
12 the minimum contacts requirements of due process. *Thomas P. Gonzalez Corp. v. Consejo*
13 *Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980) (“Personal
14 jurisdiction under the Act requires satisfaction of the traditional minimum contacts standard.”).
15 Mr. Sarkis alleges that he was in California when he responded to a worldwide advertisement for
16 a position at OHR and affixed his signature, while in California, to a job offer made from
17 Sarajevo, Bosnia. Compl. ¶¶ 9, 12, 14, 26. But thereafter he worked in Bosnia, signed successive
18 annual written contracts in Bosnia, and was terminated in Bosnia. Compl. ¶¶ 39-43, 53. The
19 alleged offending statements were also made in Bosnia. Compl. ¶¶ 157-189. To satisfy these
20 requirements, Mr. Sarkis’ claims must be based upon minimum contacts with the United States.
21 *Gonzalez Corp.*, 614 F.2d at 1255 n.5. His claims are not based upon his presence in California
22 when he accepted the original job offer but the acts that ended his employment, all of which
23 occurred in Bosnia more than four years later. Compl. ¶¶ 61-337.

24 In addition, Mr. Sarkis has not alleged that Ambassador Lajcák took any actions in the
25 United States that would subject him to personal jurisdiction in this Court. Indeed, Ambassador
26 Lajcák did not become the High Representative until after the actions at issue in this case were
27 complete. *See* Cymrot Decl. ¶ 3 and Exhibit B. Mr. Sarkis has alleged that he “is informed and
28 believes, and upon such information and belief alleges, [Gisbert] Bruns [a Deputy High
Representative and Director of the OHR Resources Department] and [Edouard] d’Aoust [Head of

the Legal Department] recommended the Termination and Same-Day Expulsion to Dr. Schwarz-Schilling and concurred in his decision to terminate and expel” Mr. Sarkis.²⁹ Compl. ¶ 53. Ambassador Lajcák was not involved in these actions.³⁰

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request the Court dismiss Mr. Sarkis’ Complaint.

Dated: August 29, 2008

BAKER & HOSTETLER LLP
LISA I. CARTEEN

/s/ Lisa I. Carteen

Lisa I. Carteen
Attorneys for Specially Appearing Defendants
OFFICE OF THE HIGH REPRESENTATIVE
an MIROSLAV LAJCÁK, in his capacity as
High Representative of the International
Community in Bosnia and Herzegovina

²⁹ Mr. Bruns is a citizen of the Federal Republic of Germany and Mr. d’Aoust is a citizen of the Kingdom of Belgium.

³⁰ Even if OHR were not an instrumentality of foreign states, the Court would not have personal jurisdiction over Defendants under California’s long-arm statute. The Ninth Circuit uses a two-part analysis in determining whether courts have personal jurisdiction over non-resident defendants. “First, the exercise of jurisdiction must satisfy the requirements of the applicable long-arm statute. Second, the exercise of jurisdiction must comport with federal due process.” *Dow Chem. Co. v. Calderon*, 422 F.3d 827, 830 (9th Cir. 2005) (citation omitted). California’s long-arm statute, Cal. Civ. Proc. Code § 410.10, allows courts to “exercise jurisdiction to the limits of the Due Process Clause of the U.S. Constitution.” *Dow Chem. Co.*, 422 F.2d at 831 (citation omitted).

Allowing this suit to proceed in this forum would not be consistent with due process. In order to satisfy due process, the defendant must have “established ‘minimum contacts’ with the forum such that (1) ‘the defendant has purposefully directed his activities at residents of the forum,’ (2) ‘the litigation results from alleged injuries that arise out or relate to those activities,’ and (3) the exercise of jurisdiction is reasonable.” *Id.* at 834 n.6 (citations omitted). Mr. Sarkis cannot demonstrate that these criteria have been met; all of Mr. Sarkis’ allegations arise from events in Bosnia; none in California. The recruitment of an employee from California does not give California courts jurisdiction over all subsequent actions regarding the employee. *See Markey v. Kudelski S.A.*, 2007 U.S. Dist. LEXIS 24709 (S.D. Cal. April 3, 2007) (granting motion to dismiss for lack of personal jurisdiction where offer of employment in California, but meeting giving rise to plaintiff’s employment termination occurred in Switzerland); *see also Katerndahl v. Brindenberg Sec., A/S*, 1996 U.S. Dist. LEXIS 22024 (N.D. Cal. Dec. 9, 1996) (granting motion to dismiss and ruling that employment ads for employment outside of California do not rise to the level of purposeful availment).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 28, 2008, a true and accurate copy of **SPECIALLY APPEARING DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS** was electronically filed with the Court to be served by operation of the Court's electronic filing system, upon the following: Jeffrey M. Forster (jforstr@pacbell.net); Philip M. Musolino (pmusolino@musolinoanddessel.com).

Dated: August 29, 2008

BAKER & HOSTETLER LLP

/s/ Lisa I. Carteen

Lisa I. Carteen

Attorneys for Specially Appearing Defendants
OFFICE OF THE HIGH REPRESENTATIVE and
MIROSLAV LAJCÁK, in his capacity as High
Representative of the International Community in
Bosnia and Herzegovina

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY SARKIS,

Plaintiff,

v.

MIROSLAV LAJCAK; OFFICE OF THE
HIGH REPRESENTATIVE,

Defendants.

Case No. C 08 01911 RMW

**[PROPOSED] ORDER GRANTING
SPECIALLY APPEARING DEFENDANTS'
MOTION TO DISMISS**

Date: October 31, 2008

Time: 9:00 a.m.

Judge: Hon. Ronald M. Whyte

Ctrm.: Courtroom 6

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

The Motion of Specially Appearing Defendants Office Of The High Representative and Miroslav Lajcak, in his capacity as High Representative of the International Community in Bosnia and Herzegovina, to dismiss Plaintiff Anthony Sarkis' Complaint pursuant to Rules 12(b)(1), (2) and (5) of the Federal Rules of Civil Procedure, on the grounds that Plaintiff improperly served them and the Court lacks personal and subject matter jurisdiction over Defendants, came on for hearing on October 31, 2008 at 9:00 a.m., before the Honorable Ronald M. Whyte. Defendants were represented by Bruce Baumgartner and Mark Cymrot and Plaintiff was represented by Philip M. Musolino.

1 After full consideration of the evidence and points and authorities submitted by all parties,
2 upon hearing the oral arguments of counsel, and all other matters presented to the Court, for the
3 reasons given below, the Court grants Specially Appearing Defendants' Motion to Dismiss and
4 dismisses Plaintiff's Complaint with prejudice:

5 (1) the Court lacks subject matter jurisdiction over Specially Appearing Defendants
6 Office Of The High Representative and Miroslav Lajcák, in his capacity as High Representative
7 of the International Community in Bosnia and Herzegovina, under Rule 12(b)(1) because
8 Defendants, as instrumentalities of a foreign state, are entitled to immunity from the Court's
9 jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.* ("FSIA");

10 (2) the Court lacks personal jurisdiction over Defendants under Rule 12(b)(2); and

11 (3) Plaintiff Anthony Sarkis failed to properly effect service on Defendants in
12 accordance with the FSIA.

13 Therefore, after consideration of the briefs and arguments of counsel and all other matters
14 presented to the Court, and good cause appearing therefore, IT IS HEREBY ORDERED that:

15 1. Specially Appearing Defendants Office Of The High Representative's and
16 Miroslav Lajcák's Motion to Dismiss is granted; and

17 2. This action is dismissed with prejudice.

18
19 DATED: _____

20 RONALD M. WHYTE
21 United States District Judge
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 29, 2008, a true and accurate copy of
**[PROPOSED] ORDER GRANTING SPECIALLY APPEARING DEFENDANTS’
MOTION TO DISMISS** was electronically filed with the Court to be served by operation of the
Court’s electronic filing system, upon the following: Jeffrey M. Forster (jforstr@pacbell.net);
Philip M. Musolino (pmusolino@musolinoanddessel.com).

Dated: August 29, 2008

BAKER & HOSTETLER LLP

/s/ Lisa I. Carteen

Lisa I. Carteen

Attorneys for Specially Appearing Defendants
OFFICE OF THE HIGH REPRESENTATIVE and
MIROSLAV LAJCÁK, in his capacity as High
Representative of the International Community in
Bosnia and Herzegovina

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